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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 432.

WILLIAM E. LAMB, *Petitioner,*

vs.

STERLING B. CRAMER, ET AL, *Respondents.*

BRIEF ON BEHALF OF PETITIONER.

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I.

THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Fifth Circuit was rendered April 9, 1931, and is reported in 48 F. (2d) 537. (R. 208-209) The opinion of the District Court is not reported. (R. 175-177)

II.

STATEMENT OF THE CASE.

The writ of certiorari was granted on November 2, 1931, (R. 214) to bring to this Court for review the order of the Circuit Court of Appeals for the Fifth Circuit reversing a decree of the District Court for the Northern District of Mississippi. By this decree the District Court had discharged a rule directed to the Petitioner, William E. Lamb, ordering him to show cause why he should not be punished for contempt because of his acceptance of certain sums, in payment for legal services, from the defendant in a pending creditor's suit. The decree also dismissed the petition upon which the rule to show cause had been issued.

This petition was filed on April 21, 1930, by the respondents, Sterling B. Cramer and others, who were plaintiffs in a suit then pending in the District Court against one Florence T. Holland. (R. 122-127.) The bill of complaint in that action had been filed about two years before, on June 23, 1928 (R. 58) and had alleged that Cramer was a judgment creditor (in the amount of $30,632.29) of W. P. Holland, the husband of Florence T. Holland; (R. 3, 44) that W. P. Holland had conveyed to his wife certain properties worth $2,000,000; and that these transfers had been in fraud of creditors and should be set aside. (R. 27, 32-33) The bill asserted that Mrs. Holland had mingled the property conveyed by her husband with her own property (R. 20) and that therefore her entire estate constituted a trust fund. In August, 1929, another creditor of W. P. Holland holding a judgment for $98,681.97 was permitted to intervene.

(R. 74, 113) On April 17, 1930, shortly before the entry of a final consent decree, banks holding judgments, aggregating over $7,000,000, rendered against W. P. Holland on the preceding day, were allowed to intervene. (R. 118) No receiver was appointed in this suit until its termination by a consent decree on April 30, 1930; nor was any injunction or restraining order, prohibiting the transfer of property by Florence T. Holland, issued until April 22, 1930, the day after the order to show cause why Lamb should not be punished for contempt, was served on him. (R. 196)

Lamb is an attorney, a resident and citizen of Evanston, Illinois. Neither the original creditor's bill brought by Cramer nor any of the intervening petitions had named him as a party. His sole connection with the creditor's suit against Florence T. Holland was as one of the attorneys of record for the defendant.

On April 21, 1930, the Respondents filed a petition in that cause alleging that since the filing of the bill, "a part of the trust fund," about $90,000, had been transferred by Mrs. Holland to her attorney, Lamb. Transfers to other parties, which are not here involved, were also alleged. The petition charged that the funds so transferred had been in the constructive possession of the District Court, and that Lamb was in contempt because he had accepted payment from Mrs. Holland. It prayed that a citation be issued to him to show cause why he should not be punished accordingly. (R. 125-126) There was an additional prayer that:

> "for the further purpose if the same shall appear necessary of cancelling and setting aside

> the various alleged covenous, fraudulent and nefarious transfers aforesaid * * * that each, all and every of above mentioned parties * * * be made parties to cause, by proper process returnable as required by law."

The petition concluded with a prayer for an injunction against further transfers of property by Mrs. Holland. (R. 126)

No subpoena or other regular civil process issued in response to the quoted prayer that the parties named in the petition be made parties to the main cause by "proper process returnable as required by law," but an order (R. 128-130) was made on the day that the petition was filed, requiring Lamb to show cause on the following day, why:

> "they and each of them should not be adjudged to be in contempt of this Court under the allegations as to them made that they and each of them accepted transfers of property in the possession of this Court with the intent to hinder, delay and defraud this Court in the exercise of its jurisdiction with reference to said property and every part thereof.
>
> "And it is further ordered, adjudged and decreed that said parties and each of them further appear at the time and place mentioned, and severally and respectively show cause, if any they have or can, why they should not be adjudged to hold all of said property described subject to the jurisdiction of this Honorable Court to be dealt with by this Honorable Court as fully and completely as if said transfers had never been made, and said property and every part thereof had remained in the possession and under the control of this Honorable Court." (R. 129.)

This order was delivered to the Marshal "to execute and return immediately", and was served on petitioner the same day, April 21, 1930. (R. 131.)

On April 30, 1930, an order was entered continuing the hearing on the citation for contempt until June 9, 1930. (R. 146-147.) On the same day, April 30, a final decree was entered in the main cause. (R. 131-146.) This decree, entered by consent of the parties, adjudged that the debts of W. P. Holland were liens upon the entire estate of the defendant, his wife; appointed a receiver for said property; and ordered Mrs. Holland to convey it to the receiver. The consent decree further provided that no personal judgment should be taken against Mrs. Holland (R. 145) and that the receiver should reconvey to W. H. Powell, one of the attorneys for Mrs. Holland, and obviously for her benefit, her residence with the personal property located therein. (R. 145-146.) The decree concluded with a provision that "William E. Lamb or Butler, Lamb, Foster and Pope [Lamb's law firm] not to be prejudiced hereby." (R. 146.)

About two weeks after the entry of this consent decree, Lamb filed on May 19, 1930, a special appearance for the "sole purpose of answering the citation issued herein * * * and answering the petition upon which said citation was issued, and not otherwise." (R. 147.) His special answer denied all charges of contumacious conduct, and alleged that he had been employed by Mrs. Holland to represent her in certain income tax proceedings in the Bureau of Internal Revenue which he had brought to a successful conclusion (R. 151-153); that thereafter he had been employed to represent her in the creditor's suit brought by the respondent, Cramer, and had performed ex-

tensive services in this connection; that he and the firm of which he was a member had received an aggregate of $60,000 as fees for these legal services (R. 156-157, 159), and $8,220.54 in repayment of cash disbursements (R. 159, 160); and that, in addition, he had received for legal services a note of Florence T. Holland for $12,500 which had not been paid. (R. 159.)

Two months later, on July 22, 1930, Lamb filed a motion (R. 173-175) to quash the citation and dismiss the petition on the grounds that, *inter alia,* neither the petition, the citation, and special appearance, nor the answer to the citation, conferred upon the court any jurisdiction over either him or the subject matter of the petition; that the facts alleged did not constitute any contempt within the provisions of Section 385, Title 28 of the United States Code, which defines the jurisdiction of the lower federal courts in contempt proceedings; and that in any event, the settlement of the main case and the entry of the consent decree in April, 1930, had deprived the court of any jurisdiction it might have had to proceed under the petition and citation. (R. 173-174)

On August 9, 1930, the District Court entered the decree from which the appeal was taken and which is here under review. The material portion of this order is as follows:

> "It is now, therefore, considered by the Court, and ordered, adjudged and decreed as follows, to-wit:
>
> "That the said motion of the said William E. Lamb to quash the process and dismiss the petition for the citation of William E. Lamb for contempt, and for an order to turn over money paid him by the defendants, be and the same is hereby

sustained and the rule to show cause is hereby discharged and the said petition is hereby dismissed without prejudice to the rights of the plaintiffs, the Receiver, or any interested party, to proceed civilly in the matter as they or any of them may be advised; and the said William E. Lamb is dismissed hence without day, and all costs of this proceeding to be taxed by the Clerk are taxed upon the plaintiffs herein, judgment for said costs when so taxed is hereby entered against plaintiffs, for which let execution issue as at law." (Rec. 176)

From this order the Respondents appealed to the Circuit Court of Appeals for the Fifth Circuit. The only error assigned on the appeal was that the court had erred in "sustaining the motion to quash the *service of process* filed herein." No such motion to quash service of the order to show cause had been made in the District Court, but as stated above, that court had merely discharged the rule for contempt and dismissed the petition on which it had been based, without considering the validity of the service of the citation. No error was assigned on the order *dismissing* the petition and *discharging* the rule for contempt.

Petitioner Lamb moved in the Circuit Court of Appeals to dismiss the appeal, but this motion was denied; and, after full argument, the decree of the District Court was reversed. In its opinion, the Circuit Court of Appeals dealt with the case on the theory that the District Court had quashed the service of the order to show cause on the ground that Lamb "was present in the jurisdiction of the court as an attorney at law and therefore immune from such process." (R. 208) It assimilated the present case to a compan-

ion case of *Schmitt v. Lamb,* 48 F. (2d) 533, now pending on *certiorari* in this Court, No. 433, October Term, 1930, in which it had denied such a claimed immunity. (R. 208) As to whether or not an actual contempt was charged in the petition, the Court said:

> "For the reasons stated in cause No. 6072 [the companion case] this day decided, we think the funds were in the constructive possession of the court, to the knowledge of Lamb and his clients, and that plaintiffs were at liberty to proceed either by bill in equity, as was done there, or by rule for contempt, or by both means, to compel their restoration to the custody of the court's officers. We are of the opinion, therefore, *that the rule did state a ground for relief and the service under the circumstances was properly made.*
>
> "The decree below *dismissed the rule by quashing the service and hence was undoubtedly final,* notwithstanding 'the reservation of the right 'to proceed civilly.'" (Italics ours)

The opinion contained no discussion of the only order actually entered by the District Court, namely, the order discharging the rule to show cause and dismissing the petition on which it was founded.

III.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in taking jurisdiction of the appeal.

2. The Circuit Court of Appeals erred in reversing the decree from which the appeal was taken.

IV.

SUMMARY OF ARGUMENT.

There is a preliminary question whether the Circuit Court of Appeals had jurisdiction of the appeal at all. The contempt, if there was any contempt, would seem to have been criminal and not civil, and an order terminating the proceeding in favor of the defendant was therefore not appealable.

But passing that, our main argument will be directed to showing that the action of the District Court in discharging the rule to show cause and in dismissing the petition upon which it was based, was proper. Very little aid in determining this issue can be had from either the decision or opinion of the Circuit Court of Appeals, for, as clearly evidenced by the record, that Court decided the case on an issue not raised by the pleadings, and on the mistaken assumption that the lower court had quashed the *service* of the rule to show cause, rather than discharged the rule itself. Were the present proceeding a law case, this would in itself warrant reversal. *Fayerweather v. Ritch,* 195 U. S. 276, 298-299; *Midland Bank v. Insurance Co.,* 277 U. S. 346. Since the order under review, however, was entered in the course of an equity case and is before this Court on *certiorari,* the entire record may be examined, and a definite disposition of the case made. See *Panama Railway Co. v. Napier Shipping Co.,* 166 U. S. 280, 284; *Cole v. Ralph,* 252 U. S. 286, 290.

That record discloses the following unusual proceeding in the District Court: A petition asking that Lamb be punished for contempt for accepting payment for legal services, and also that he be made a

party to a creditor's suit then pending; an order to show cause why he should not be punished for contempt, which order was served on him by the Marshal; a special appearance and special answer to the contempt charge made by Lamb after the termination of the principal cause; and a motion to dismiss the petition and discharge the rule, which motion was granted by the District Court. We shall endeavor to show in this brief that no matter how this proceeding be regarded, the action of the District Court was not improper. If the petition be regarded as an application to punish Lamb for contempt, either civilly or criminally, and the rule to show cause as a citation therefor, the petition was properly dismissed and the rule to show cause properly discharged because the facts alleged did not constitute a contempt within the meaning of Section 268 of the Judicial Code.

It will be shown that it would be improper to regard the petition as equivalent to a supplemental bill, because it was not so regarded by either of the parties or the District Court at the time. Even if the petition be regarded as a supplemental bill making Lamb a party to the original creditor's suit, the petition was properly dismissed and the rule to show cause properly discharged because the facts alleged did not constitute a cause of action.

ARGUMENT.

A.

The Appeal Should Have Been Dismissed for Want of Jurisdiction.

The district court's order was a judgment for a defendant in a criminal case which the Court of Appeals had no power to review.

In *United States v. Sanges*, 144 U. S. 310, 323, this Court held that the Circuit Court of Appeals had no jurisdiction to review a judgment for a defendant in a criminal case, whether such judgment was entered on a verdict or upon the determination of a point of law by the court. (See also *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 410.) In *United States v. Bittner*, 11 F. (2d) 93, and *Wingert v. Kieffer*, 29 F. (2d) 59, this rule was applied to judgments in favor of the defendant in proceedings for criminal contempt.

If the petition alleged facts constituting a contempt, it charged a criminal contempt rather than civil. It was brought against one not a party to the suit in which the proceeding was instituted and it was not directed to the enforcement of an order in favor of the party instituting it (R. 196). Such proceeding is necessarily one for criminal contempt.

Bessette v. W. B. Conkey Company, 194 U. S. 324.
Matter of Christensen Engineering Company, 194 U. S. 458.
Gompers v. Bucks Stove & Range Company, 221 U. S. 418, 441-444, 448.

The prime purpose of the proceeding was to vindicate the dignity of the court and its power and au-

thority; the petition charged that the payments to Lamb were in "contemptuous and contumacious disregard of this Court of equity and its power, right and authority." (R. 125.)

It is also evident that the District Court regarded the proceeding as one for criminal contempt. The District Court's order dismissing the petition and discharging the rule was made expressly without prejudice to the right of any of the parties or the receiver "to proceed *civilly* in the matter as they or any of them may be advised" (R. 176).

B.

If the Proceeding Be Regarded as an Application to Punish Petitioner for Contempt, the District Court Did Not Err in Dismissing the Petition and Discharging the Rule.

It is Petitioner's position that the facts alleged did not constitute contempt of any sort.

The receipt of payment by Lamb for services rendered was in no way a "disobedience or resistance * * * to any lawful writ, process, order, rule, decree, or command of" the District Court. Judicial Code, Section 268.[1] For no such command, order, rule or

[1] That section reads: "*Administration of oaths; contempts.* The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts." (U. S. C. Title 28, Sec. 385.)

decree had been issued. The payments were made between August 7, 1928, and December 16, 1929. (R. 156, 157) At that time there had been filed merely a bill of complaint alleging that Mrs. Holland had received property in fraud of Mr. Holland's creditors. No order, injunction, or decree, restraining in any manner the right of Mrs. Holland to use her own property for the payment of her lawful debts, had been entered. Under these circumstances it is patent that there could have been no disobedience because there had been no order. *United States v. Day,* Fed. Cas. 14934; *Ex parte, Buskirk,* 72 Fed. 14. Compare *James v. Downs,* 18 Ves. 521, in which Lord Eldon stated the rule:

> "The party can not be committed for the breach of an injunction, that express species of contempt, unless there is an injunction."

In *Ex parte Buskirk, supra,* the Court said:

> "Testing the record of this case in the court below by the rules so established, it will be found that said court had no jurisdiction of the proceeding against Buskirk for contempt. *At the time the same was instituted there had not been issued by the court any writ, process, order, rule, decree, or command in the said chancery cause* of King v. Buskirk and Mullins, *to which the petitioner had or could have shown any disobedience* or resistance whatever, as the record clearly shows. Indeed, the charge as first made seems to recognize this as true, and the affidavit first filed and the order first entered sets up the violation of a 'stipulation' made in open court as the foundation of the proceedings for contempt. However reprehensible such conduct on the part of Buskirk may have been,—proceeding upon the theory that

the charge was true, which he, however, denied in his answer,—it nevertheless did not constitute a contempt to the court or its orders, and did not authorize any proceedings for a contempt under the provisions of the law as it then existed. *A careful examination of the record shows that Buskirk had not been ordered to do or decreed not to do any act or thing in said chancery suit prior to the time he was proceeded against, fined, and committed for contempt.* Such being the case, the court had no jurisdiction of said contempt proceedings, and the rule should not have been granted." (Italics ours.)

Nor can it be said the action of Lamb in accepting payment for legal services rendered, constituted an interference with property in the actual or constructive possession of the Court. No receiver for Mrs. Holland's property had been appointed, even though one had been requested in the original bill; and in no way was such property in the actual or constructive possession of the Court. The mere filing of the bill certainly did not have this effect. See *Steam-Stone Cutter Co. v. Windsor Manufacturing Company,* 3 Fed. 298. No case has been found in which the filing of a bill alone, in a cause of action concerning specific properties, was held sufficient to vest in the Court constructive custody of such property. Accordingly, it is submitted that Lamb's action in accepting the payment for legal services already completed was, in the absence of any order bringing the property within the control of the Court, no more a contempt than would have been the acceptance of payment by Mrs. Holland's grocer for food delivered or by her physician for medical services rendered.

As has been pointed out, no authority has been

cited for any such doctrine, nor do we believe any considered decision could be found to support it. It is the common and usual practice of plaintiffs in creditors' suits to include in a bill to set aside fraudulent transfers of property a prayer for an injunction, and of courts of equity to grant such prayers upon a showing that there is danger that the property may be dissipated or removed from the jurisdiction of the court, and, in the ordinary case, upon the furnishing of an injunction bond. Obviously the reason for granting an injunction in such cases is that the court may be enabled to proceed summarily against intermeddlers by process for contempt. There would be neither occasion, warrant, nor justification for this practice if the mere filing of a creditor's bill and the service of process issued thereon gives the court full jurisdiction so to proceed, nor is it conceivable that courts of equity would tolerate the doctrine that a judgment creditor upon mere allegations that his debtor had fraudulently conveyed property to a defendant could tie up the defendant's entire estate without being required to furnish any bond or security whatever.

Nor can it be said that Lamb's acts in so accepting payment constituted a contempt because, as an attorney, he was an officer of the Court and that therefore his acts were improper. This appears to be the burden of a rather vague allegation in the petition that the alleged contempt had been committed by Lamb "as an officer of this Court." (R. 125) The argument seems to be that merely because Lamb, at the time he accepted payment for previous services rendered, was representing a party in an action in the District Court, the receipt of such payment was in

itself tantamount to a constructive contempt committed in the presence of the Court "or so near thereto as to obstruct the administration of justice." Judicial Code, Section 268; see *Ex Parte Bradley*, 7 Wall. 364, 367; *Ex parte Robinson*, 19 Wall. 505. While it is true that an attorney, as an officer of Court, is subject to summary punishment for misconduct falling within Section 268 of the Judicial Code, such acts must clearly impede the administration of justice or impair the dignity of the Court.[1] Moreover, such contempt would quite clearly be criminal, and a judgment for defendant not appealable. But in the absence of any order or injunction or decree bringing the property of Mrs. Holland within the control of the Court, it is difficult to see how the fact that Lamb was her attorney, made an otherwise proper act a constructive contempt, subjecting him to summary criminal punishment as well as to professional disgrace and disbarment. Compare *M'Call Co. v. Bladworth*, 290 Fed. 365, 368.

Petitioner submits that the dismissal of the petition and discharge of the rule were entirely proper.[2]

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[1] See *Sharon v. Hill*, 24 Fed. 726 (bearing arms); *Bogart v. Electrical Supply Co.*, 27 Fed. 722 (unnecessary reference); *Anderson v. Comptois*, 109 Fed. 971 (advising blanket disobedience to all returns); *Ex parte Davis*, 112 Fed. 139 (direct disobedience); *Leber vs. United States, ex rel Fleming*, 170 Fed. 881, 890; *United States v. Ford*, 9 Fed. (2d) 990, (falsifying records).

[2] This was expressly admitted in Respondents' reply to motion to dismiss the appeal in the Circuit Court of Appeals, which stated as to this: "There is no error assigned by the appellant upon the action of the Court below in dismissing the contempt charge * * * We can, therefore, for the purposes of this appeal, agree with counsel that the Court was correct in dismissing the contempt charge." (R. 200)

If the payment received by Lamb had been the consideration for real estate or chattels conveyed in good faith to Mrs. Holland, there clearly would not have been any impropriety in his accepting payment, merely because he was her attorney at the time. The receipt of reasonable payment for legal services previously rendered in good faith and for cash disbursements on behalf of a client, is obviously on no different basis. Merely because Lamb happened to be Mrs. Holland's attorney at the time, does not abrogate his right to deal with her, in the absence of any injunction or order bringing her property within the custody of the Court. Under such circumstances, to subject an attorney to summary punishment and probable disgrace and disbarment would have been an unjustified extension of the concept of a contempt, and an abuse of the inherent power of a Court to punish it. The District Court, which throughout regarded the proceeding as one to punish for a contempt, properly dismissed the petition and discharged the rule to show cause.

C.

If the Petition Be Regarded as a Supplemental Bill, the District Court Did Not Err in Dismissing the Petition and Discharging the Rule.

The unusual proceedings had by Respondents in the District Court were at the time regarded by Court and parties alike solely as an application to punish petitioner for an alleged contempt. As has been shown, the District Court believed that it was dealing with a charge of *criminal* contempt.

However, in the Court of Appeals, Respondents' single specification of error was that the Court had

acted erroneously in "sustaining the motion to quash the service of process." (R. 180.) Similarly, Respondents disclaimed in the Circuit Court of Appeals any attempt to interpret the proceedings as an application for criminal contempt (R. 200), and endeavored to show that the petition was in reality a supplemental bill, and that in some fashion Lamb had been brought into the case generally.

Respondents' contention in this respect apparently will be renewed in this Court, for, in their brief in opposition, they argue:

> "That the Circuit Court of Appeals in effect ruled that the ancillary petition and order, service on him of a copy of said order, and his answer and plea of exoneration made petitioner a party to the original case, and gave the district court full jurisdiction and it should not have quashed the citation." (Respondents' Brief in Opposition, p. 5.)

We shall not essay an explanation as to how the proceedings were interpreted by the Circuit Court of Appeals. But it should be noted that nowhere in the opinion of that Court is it remotely indicated that any question relating to plenary jurisdiction over the Petitioner was involved.[4]

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[4] In objecting to the inclusion of additional portions of the Record in the appeal to the Circuit Court of Appeals, Respondent stated:

"The sole question on appeal as presented to the Circuit Court of Appeals, and as presented to the Honorable E. R. Holmes, Judge of the lower Court, was and is:

"Was William E. Lamb at the time of the service of the writ upon him in this cause, a non-resident attorney attending Court in a foreign jurisdiction, and hence not subject to the service of subpoena, or other writ in the District Court of the United States for the Delta Division of the Northern District of the State of Mississippi?" (R. 192)

In the following section of this brief we shall endeavor to show, first, that the Respondents' belated *ad hoc* contention that the petition to punish for contempt was in effect a supplemental bill and was erroneously dismissed, is unfounded; secondly, that even accepting their contention, that the petition was in effect a supplemental bill, Lamb has not been brought in generally, and finally the petition considered as a supplemental bill failed to state a cause of action and its dismissal could not constitute reversible error.

1. The Contention that the Petition Should Be Treated as a Supplemental Bill and that It Was Erroneously Dismissed is Without Foundation in the Record.

It is apparent that all parties treated the petition as one to punish Lamb for contempt. No one ever regarded it as a bill for general relief. So little was it regarded as a bill for general relief that the Receiver had begun, on April 30, while the contempt proceeding was still pending and undecided, a separate suit against Lamb for all of the relief which it is now claimed was sought in the contempt petition considered as a supplemental bill. That suit is now pending in this Court, No. 433, October Term, 1931, next following the present case. No one at the time of argument in the District Court thought that the petition could be treated as a supplemental bill. In fact, on April 30th only eight days after the filing of the petition, a final consent decree was entered in the main cause, and the so-called supplemental bill was not mentioned in it.

That such was the situation is clearly shown by the record. The petition asked that Lamb be cited for

contempt and that "if necessary" he be made a party "by proper process returnable as required by law." No such process was ever issued or served. A citation to show cause was served requiring petitioner to appear and answer the contempt charge.

If the petition be regarded as embracing both an application to punish for contempt and a supplemental bill for general relief, it was improper to join the two prayers in the one application as was said in *In re Chiles,* 22 Wall. 157, 168:

> "Such a proceeding can constitute no part of process for contempt in disregarding an existing order of the court. The granting or refusal of such an order is governed by very different considerations, and is to be brought to the attention of the court by very different proceedings than such as belong to the one [for contempt] now before us."

It is at least irregular to join in one pleading two dissimilar proceedings, that is, a citation for contempt, and a prayer for general relief. Clearly, Respondents elected to treat the pleading as a citation for contempt, and it was disposed of in the District Court on that basis. They could not thereafter ignore the contempt feature and decide to treat the pleading as a supplemental bill.

2. Lamb Was Never Brought Into the Proceeding Generally.

As we have shown, the proceeding was treated as a summary proceeding to punish Lamb for contempt. Lamb took such measures therein and only such measures as he deemed necessary to purge himself from

contempt. His answer was directed to clearing himself of this charge. To have done less was to run the risk of being committed for contempt. Yet the Respondents seem to think that in some way Lamb by his answer to the contempt charge became a party to the petition generally in its aspect as a supplemental bill.

The petition prayed that Lamb be made a party to the original cause "by proper process returnable as required by law." This meant and could mean only a subpoena issued under the seal of the Court as required by Title 28, Section 721 of the United States Code, and in accordance with Equity Rules 7 and 12. *In re Tacoma Auto Freight, Inc.*, 5 F. (2d) 752. No such subpoena was ever issued. The order to show cause why the petitioner should not be adjudged in contempt and punished therefor, which was the only process issued, did not comply in any respect with the requirements for mesne process and could not properly confer jurisdiction over Lamb as a party generally. This order required him to appear in Court the very next day; it clearly contemplated, and was interpreted by the District Court as demanding, a showing in answer to a charge of contempt.

Nor did Lamb's special appearance amount to a general appearance and answer to the petition, interpreting the latter as a supplemental bill. His answer begins with the specific statement:

> "Now comes William E. Lamb, *appearing in this cause specially* and for the sole purpose of answering the *citation* issued herein and served upon him on or about April 21, 1930, and answering the petition upon which said citation was issued, and not otherwise." (R. 147)

His answer concludes as follows (R. 167):

> "Now, having fully answered both said citation and said petition, said William E. Lamb prays that *he be held to have committed no contempt as in the petition alleged* or as in the citation charged, and that he be fully and completely exonerated from all charges therefor, and fully and completely discharged from said citation, and that the same be discharged as against him; * * *"

Subsequently he filed a motion which recited that he does:

> "appear specially for the purpose of moving the Court to quash the citation aforesaid and to dismiss the petition aforesaid and for no other purpose."

This clearly indicates the absence of any intention upon his part, or the possibility of his statements being reasonably interpreted to mean that he intended, to appear generally and answer to a supplemental bill. That the District Court interpreted the proceeding solely as one for contempt likewise appears from its order which recites:

> "This day came on to be heard at Chambers in vacation by consent of all parties hereto the above styled cause upon the petition of plaintiffs for the citation of *William E. Lamb for contempt.*"

As has already been stated the Court discharged the rule to show cause and dismissed the petition "without prejudice to the rights of the plaintiffs, the re-

ceiver, or any interested party, *to proceed civilly* in the matter as they or any of them may be advised."[5]

It thus appears that there is absolutely no foundation in the record for the belated insistence of Respondents that Lamb's special appearance and answer, were in reality a general appearance on his part.

The Respondents could not by improperly joining a contempt proceeding with a prayer for general relief make Lamb's answer to the contempt citation a general appearance to the prayer for general relief. Lamb did no more than was necessary in answer to the citation for contempt.

Therefore, if the petition for contempt can be regarded as a supplemental bill in equity, it simply stands as a bill filed without any process having been issued or served upon Lamb, and without any pleading of any kind having been filed in response thereto by Lamb. Before Lamb can be required to answer or appear in response to such a supplemental bill, proper process must be served upon him in the manner provided by law. The only process issued or served upon Lamb was the summary citation for contempt and that has been discharged and the contempt proceeding terminated, an action in which Respondents have expressly acquiesced (R. 200). Therefore, before any action can be taken upon the petition as a supple-

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[5] This interpretation is further confirmed by the statement in the order: "That the said motion of the said William E. Lamb to quash the process and *dismiss the petition* for *the citation of William E. Lamb for contempt* and for an order to turn over money paid him by the defendants, be and the same is hereby sustained and the rule to show cause is hereby discharged and the said petition is hereby dismissed." (R. 176)

mental bill, respondents must bring Lamb into Court by proper service, which up to this time has not been had.

3. Even if the Petition Be Regarded as a Supplemental Bill, Its Dismissal Was Not Reversible Error.

Even if this oddly drawn petition be regarded as the equivalent of a supplemental bill, petitioner submits that the action of the District Court in dismissing the petition should not have been reversed. If the irregular proceeding can be considered as having presented to the lower court a supplemental bill in equity and the court's action can be considered as having dismissed such a bill, without any process having been issued or served thereon or any pleading filed in response thereto, such action is not reversible error, because the so-called supplemental bill failed to state a cause of action against Lamb.

It alleged in the most general terms that Mrs. Holland "transferred, set over, and assigned to the said William E. Lamb of the firm of attorneys aforesaid a part of the trust fund herein sued for to wit; approximately $90,000 of said trust fund." (R. 125) There is a further averment that Lamb knew that the fund so transferred was part of the "trust fund." The creditor's bill described certain specific real estate and certain specific securities as having been transferred by Mr. Holland to Mrs. Holland in fraud of creditors; but the petition against Lamb did not allege that any of this specifically described property was obtained by Lamb from Mrs. Holland. There were additional vague allegations in the creditor's bill to the effect that other property not described had also been so transferred by Mr. Holland

to Mrs. Holland. In general terms it was asserted that property worth $2,000,000 had been transferred by Mr. Holland to Mrs. Holland and that she had mingled it with her own property. But the description of Mrs. Holland's property as a "trust fund" necessarily assumed what in fact had not happened —namely, that at the time Lamb received payment from Mrs. Holland a receiver of her property had been appointed or an order entered bringing such property within the Court. Obviously there was no express trust. Thus the only allegations in the so-called supplemental bill, when it is stripped of its verbiage, are that Mrs. Holland, a defendant in a creditor's suit pending in the District Court, had paid Lamb for legal services. There are no averments as to the circumstances surrounding the transaction and no averments of any matters of fact upon which any charge of fraud could be based. There is no averment of lack of consideration. It was not alleged that at the time of the alleged payment the Court had impounded the fund, had issued an injunction, or had appointed a receiver.

It is manifest that on demurrer these allegations would not have warranted a decree against Lamb. The so-called supplemental bill indicated no more than that in the ordinary course of business Lamb had had dealings with Mrs. Holland and had been paid moneys by her. If these averments constitute a cause of action against Lamb then similar bills could be filed and maintained against every grocer from whom Mrs. Holland had purchased a loaf of bread.

Even if there had been proper allegations of fraud and/or lack of consideration, the petition, treated as

a supplemental bill, failed to set forth a cause of action because it did not specify the particular property transferred.

From the original creditor's bill it appears that the alleged "trust fund", that is, property improperly received by Mrs. Holland, of which it is claimed that Lamb received a part, consisted in a large part of property which was not only not specifically described or identified, but which the bill alleged the complainant was unable to describe or identify. (R. 19-21) The bill also showed that a portion of this supposed "trust fund" was beyond the territorial jurisdiction of the Court. And it alleged that the property which Mrs. Holland received from her husband had been so intermingled with her own property that it could not be segregated therefrom. Since in the petition against Lamb Respondents did not attempt to identify the "trust property" which Lamb had received, the allegations of the petition, taken against the party filing it, must be construed to refer to that part of the alleged trust fund which the bill did not describe or identify. Petitioner submits that even the widest conception of "constructive possession" by a Court cannot be extended to embrace a fund which is neither located nor described in the bill, so that a person receiving it could not determine its identity. Clearly, there could be no equitable levy upon property the location and identity of which are unknown to the Court.

The transfers attacked by the petition were payments of attorneys' fees in the ordinary course of business. The same reasoning which would require Lamb to return sums received in payment of attorneys' fees in regular course of business would apply

equally to a payment to a physician or payments to the keeper of the hotel in which Mrs. Holland lodged while attending Court.

In this connection, it should be noted that the original bill alleged that Mrs. Holland had acquired the entire estate of W. P. Holland valued at $2,000,000 or $3,000,000 and had mingled his property with her own property. The only judgment creditors who were parties to the suit at the time Mrs. Holland made the payments to Lamb were the plaintiff Cramer and one other, and their claims totaled $132,151.05.[6] Under these circumstances, even if the petition be regarded as a supplemental bill and Lamb as having appeared in the case generally, the order of the District Court was not erroneous for the bill could not possibly have supported any decree whatever against Lamb.

Consequences of Reversing the Decree of the District Court.

The consequences of affirming the decree of the Court of Appeals reversing the order of the District Court should be called to the Court's attention. If

[6] The original plaintiff, Cramer, in cause No. 129 was assignee of a judgment for $30,632.78 (R. 3, 44), which at the time the final decree was entered in the creditor's suit, had been reduced to $19,653.63, inclusive of interest to April 30, 1930 (R. 132). After the commencement of this suit a bank intervened on a judgment rendered in the state court in the amount of $98,681.97 (R. 74, 113), which at the time of the final decree in the creditor's suit amounted to $112,497.42, inclusive of interest (R. 132). The sum of the amounts due on these two judgments was $132,151.05: These were the only judgments sued on until the intervention just preceding the entry of the consent decree, which intervention came after all the payments to Lamb had been made.

the cause be reinstated in the District Court, that court could not thereafter proceed to punish Lamb for contempt. For as has been shown, there was clearly no contempt. Nor is it easy to see how the petition could be reinstated as a supplemental bill. The main cause has been disposed of by final decree. And if it is to be reinstated and treated as a supplemental bill, how is Lamb to be brought into Court? He has never appeared generally. He appeared specially to answer the rule for contempt. He has never been served with process. Will the supplemental bill stand until Lamb has been served with process? If Lamb is subsequently served with process and issue is joined, what rule of substantive law is to be applied? Can Lamb be required to return all the money received or is he entitled to retain so much as may be found to be reasonable compensation for his services? One further question: As explained above, the receiver, Schmitt, filed an ancillary suit against Lamb for precisely the same relief as is prayed in this petition treating it as a supplemental bill. Can he prosecute that ancillary suit while Cramer, the original complainant, is prosecuting this so-called supplemental bill against Lamb based upon the same allegations for the same relief at the same time? These difficulties, occasioned but not resolved, by the reversal of the order of the District Court dismissing the petition, may be settled by the affirmance of the District Court's order which, as has been shown, was properly made no matter how the petition be interpreted.

In conclusion, Petitioner submits that the belated endeavor of Respondents to convert a contempt proceeding into a plenary suit should not be sanctioned

by this Court. The procedure has been confused by Respondents' hybrid pleadings, and Petitioner's rights clearly prejudiced. Interpreted by the District Court as a contempt proceeding, the petition was properly dismissed because no contempt was shown. Even if the present attempt to warp the petition into a supplemental bill be countenanced, no cause of action is set forth, and the dismissal should not have been reversed. Finally, the decree of the Circuit Court of Appeals reversing the order of dismissal, no matter on what theory based, was predicated on the existence of an order which is not in the record.

It is respectfully submitted that for the reasons advanced in the foregoing brief, the decree of the Circuit Court of Appeals should be reversed, and the order of the District Court affirmed.

Respectfully submitted,

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